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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted].13

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,
vs.
J. U. McKENDREE,
Defendant in Error.

In Error to the Circuit Court of Carlisle County, State of Kentucky.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR UPON THE SUGGESTION OF THE WANT OF JURISDICTION.

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In the original brief filed by the plaintiff in error in the cause, in the statement of the case, at pages 1 to 8 will be found set out at large those parts of the record which indicate the Federal questions arising thereon. At pages 17 to 21, inclusive, of said brief will be found a discussion of the question of the jurisdiction of the court. It is deemed unnecessary to repeat in this brief the matter therein contained. The attention of the court is, however, particularly called to the following passages of the pleadings.

In his amended petition at Rec., 5, the plaintiff set

up as his cause of action that the defendant had received cattle "south of the quarantine line that was established on the 14th day of March, 1903, by and under the existing quarantine laws, and that said quarantine line" (here inserting a description of the quarantine line through the body of the State of Tennessee, as set forth in Amendment No. 4 to B. A. I. Order No. 107, at Rec., 34), and transported them north of it, unloaded them at Arlington and placed them in the stock pens of the defendant adjacent to the public highway and commons where the plaintiff's cows came in contact with the infection. It was upon this petition, as appears from Rec., 5, that the defendant took issue.

At Rec., 3, it appears that the defendant in its amended answer had set up the following:

> "Further answering herein, the defendant says that the claims of the plaintiff herein asserted are based upon a certain alleged act of Congress of the United States of America, approved February 2, 1903, 'entitled an act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock and for other purposes,' which act is published and contained in volume 32 United States Statutes at Large, beginning at page 791 and also in a supplement to the United States Compiled Statutes issued in 1903, by the West Publishing Company, St. Paul, Minn., beginning at page 372 of said volume, and said claims are further based upon certain alleged regulations adopted and promulgated by the Secretary of Agriculture on March 13, 1903, pursuant to the authority attempted to be conferred upon him by said alleged act of Congress above mentioned approved February 2, 1903.
>
> "The defendant says that said act of Congress

hereinbefore mentioned and said regulations adopted by the Secretary of Agriculture as hereinbefore stated are each and all of them repugnant to and in contravention of the Constitution of the United States of America and is in excess of the powers of Congress and of the Secretary of Agriculture under the Constitution of the United States, and they are each and all, therefore, unconstitutional and void, and under the Constitution of the United States this defendant has the right, privilege and immunity of being exempt from the assertion or prosecution of any claims against it based upon or arising under such act of Congress or said regulations or any of them, and this defendant as permitted by section 709 of the Revised Statutes of the United States hereby specially sets up and claims and pleads in defense of this action the right and privilege and immunity which is secured to it by the Constitution of the United States to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture."

At Rec., 6, it appears that the plaintiff's demurrer to this answer was sustained, to which the defendant excepted.

The court will observe that by the amended answer, to which a demurrer was sustained below, the defendant specially claimed that the Act of Congress of February 2, 1903, was void, and that the regulations adopted by the Secretary of Agriculture upon which the plaintiff based his claim were void, and that the defendant was entitled to be exempt from suit based upon the Act and upon the regulations adopted by the Secretary of Agriculture. From the certificate of the presiding judge at the trial (Rec., 10), it appears that the objection to the regulations of the Secretary of

Agriculture was based upon the grounds, not only that they were in excess of the powers which could be conferred by Congress under the Constitution, but that they were in excess of the powers actually conferred, also that under the statute no right of action arose to the plaintiff, and that under the statute the defendant was exempt from civil liability. When the court below refused to instruct the jury to find for the defendant (Rec., 8) it not only denied the immunity of the defendant from interference with its right to pursue interstate commerce undisturbed except according to law, but also its immunity from civil suit under the Act of February 2, 1903. The case involves not only the Federal questions arising under the commerce clause as to whether or not the particular regulation enforced against the defendant was a regulation of interstate commerce, but it also involves the entirely distinct Federal question whether or not the powers of Congress can be delegated for any purpose, depending not upon the commerce clause in particular, but upon the general frame of the first Article of the Constitution, more particularly perhaps Article 1, Section 1:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The case at bar is one of that comparatively rare class where a decision either way necessarily involves a decision against a claim to a Federal right, so that either party, if defeated, would have the right to appeal to the Supreme Court of the United States. Each of the contending parties based his right upon the provision of the Act of February 2, 1903, and claimed a right, privilege or immunity thereunder, the plaintiff

claiming that it gave him a right of action against the defendant, the defendant claiming that it gave him an immunity from civil suit, and also that the Constitution gave him immunity from liability.

Thus, in the case of *Matthews* v. *Zane*, 4 Cranch, 382 (1808), both parties claimed title to land under the same act of Congress. The Reporter says:

> "The court at first hesitated as to the jurisdiction but upon consultation together and deliberation,
>
> "Marshall, Ch. J., declared it to be the opinion of a majority of the judges, that this court has jurisdiction."

In *Buel* v. *Van Ness*, 8 Wheaton, 312, 324 (1823), where Van Ness succeeded Buel as collector of customs and the suit involved the question which of them was entitled to a certain forfeiture under a certain act of Congress, the court considered the question as settled by *Matthews* v. *Zane*, saying:

> "The literal meaning of the terms of the 25th section (of the Judiciary Act) embraces the plaintiff's case; as it would also have embraced that of the defendant, had the state court decided against his claim under the same act."

So in *Palmer* v. *Hussey*, 119 U. S., 96 (1886), where the defendant claimed the protection of a discharge in bankruptcy and the plaintiff claimed that the discharge was not applicable because the offense arose from the breach of a fiduciary relation, and the Court of Appeals of New York had sustained the contention of Hussey, the jurisdiction of this court to entertain an appeal by Palmer was sustained.

Likewise, in *McCormick* v. *Market Bank*, 165 U. S., 538, 545 (1897), the question arose whether under the

national bank act the execution of a lease of premises before a certificate had been obtained authorizing the corporation to do a banking business was incidental and necessarily preliminary to its organization and thus falling within the exception to the statute forbidding the transaction of business. The Supreme Court of Illinois held that the contract of lease was not of this incidental and necessarily preliminary character. Mr. Justice Gray, in delivering the opinion of the court, after pointing out that had the decision been the other way the defendant would have been entitled to a writ of error, adds:

> "It does not, however, follow that the plaintiff is not entitled to a review by this court of the judgment, so far as it was against him."

The court further said:

> "The case, in this particular, is analogous to those arising under the provision of the Bankrupt Act, that a bankrupt who had in all things conformed to his duty under the act should receive a discharge from all his debts, with certain exceptions, among which were debts created by his fraud or embezzlement, or by his defalcation as a public officer, or while acting in a fiduciary character. Rev. Stat., Secs. 5114, 5117. In *Strader* v. *Baldwin*, 9 How., 261, indeed, under like provision of a former bankrupt act, where a bankrupt, being sued upon a debt, pleaded his discharge, and the plaintiff replied that the debt was contracted while acting in a fiduciary capacity, and the decision of the state court was in favor of the defendant, this court held that it had no jurisdiction, because the decision below was in favor of the right set up by the defendant. But the court there failed to notice that the decision, while in favor of the right or immunity, set up by the defendant, of a discharge under the Bankrupt Act, was also against the right or immunity, set up by

the plaintiff, under the clause excepting fiduciary debts from the effect of that discharge. And the case has accordingly been overruled in similar cases arising under the recent bankrupt act, in which this court has taken jurisdiction, not only when the writ of error was sued out by the defendant; *Neal* v. *Clark*, 95 U. S., 704; but also when it was sued out by the plaintiff, because, as was said by Chief Justice Waite in delivering judgment in the latest case upon this point, the plaintiff 'specially set up and claimed an immunity, under Sec. 5117 of the Revised Statutes, from the operation of the discharge in bankruptcy, because of the fraudulent and fiduciary character of his debt, and the decision was against him.' *Hennequin* v. *Clews*, 111 U. S., 676; *Palmer* v. *Hussey*, 119 U. S., 96, 98."

In analogy to the cases which have been cited showing that where there is a Federal statute containing an exception and the parties to a suit are in dispute as to whether or not their case falls within the exception, either party has a right of appeal to this court, a corresponding situation also arises in the present suit under the immunity claimed by the appellant railroad company from interference with its actions, or being charged with liability therefor, in conducting interstate commerce. Under the Constitution of the United States the railroad company has the immunity of conducting its interstate transportation free from any interference except by authority of law. It was claimed by the plaintiff below that authority at law exists for making such interference, to-wit: the regulation of the Secretary of Agriculture and the statute purporting to authorize him to make such regulation. It was claimed by the railroad company that this statute and this regulation do not create an exception to the rule, be-

cause the statute is itself unconstitutional as an attempt to delegate the legislative power of Congress, and that the regulation of the Secretary of Agriculture is unconstitutional as attempting to exercise the legislative power of Congress, and also in attempting to draw a quarantine line through the middle of a state and forbidding the transportation of cattle from points south of this line to points north of it, and that the Secretary of Agriculture in so doing exercised powers which the statute did not delegate to him, as he was never intended to be vested with power to regulate intra-state commerce. The authorities which have been cited clearly indicate that in cases similar to this, whatever the ruling of the court below had been the party injuriously affected thereby would have the right of appeal to this court.

Under Section 709 of the Revised Statutes (4 Fed. Stat. Ann., 467) in case of a final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, a writ of error lies to the Supreme Court of the United States. Under this clause unquestionably this writ of error could not be sustained. But it is further provided that:

> "Where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority"

a writ of error will also lie. In the case at bar the fol-

lowing rights, privileges or immunities were claimed under the Constitution and Statutes of the United States:

(1) That under the Constitution, in the absence of any state or Federal law to the contrary, the defendant had the right to transport cattle not known to be infected from one state to another without liability except for negligence.

(2) That under the Constitution the defendant was exempt from any regulations of interstate commerce made by the Secretary of Agriculture only.

(3) That under the Constitution the defendant was exempt from any regulations of interstate commerce which were essentially regulations of intra-state commerce as well.

(4) That under the statutes purporting to authorize regulation of animal industry by the Secretary of Agriculture, the defendant was not liable to any civil action for violation of the regulations of the Secretary of Agriculture.

It is quite immaterial that the state court held valid the statutes of the United States and the authority exercised thereunder which were questioned by the defendant, for the ground of appeal is that the state court decided against a right, privilege or immunity claimed under the Constitution or the statutes of the United States. For example, in *Trebilcock* v. *Wilson*, 12 Wall., 687 (1871), the Supreme Court of Iowa decided in favor of the constitutionality of the Act of Congress declaring treasury notes a legal tender, but the Supreme Court of the United States took jurisdiction and reversed the case upon the ground that under

the Constitution the appellant was entitled to have judgment entered payable in specie, as otherwise the obligation of contracts would have been impaired, deliberately overruling *Roosevelt* v. *Meyer,* 1 Wall., 512 (1863), in which this court had refused to take jurisdiction in a similar case.

In *Pennywit* v. *Eaton,* 15 Wall., 380 (1872), the Supreme Court of the United States considered it was bound to take jurisdiction of an appeal from the Supreme Court of Arkansas in a case where the latter court had sustained the validity of the appointment of a judge by the Military Governor of Louisiana, thus sustaining the validity of an authority exercised under the United States, the appellant claiming, however, that such an appointment was invalid under the clause in the Constitution relating to judicial power.

The opinion is so short that the whole will be quoted, as it is an authority which holds that the court was bound to take jurisdiction and also one in which the Federal question was not reserved with nearly so much precision as in the case at bar.

The opinion of the court is as follows:

> "The Pulaski County Court was requested to hold, that if it appeared from the evidence that the judge who presided in the court at New Orleans and rendered the judgment there, held his office by appointment from a military governor of the State of Louisiana, and under no other authority, the judgment was void. This raised, though somewhat obscurely, the question whether the court so held had any jurisdiction under the Constitution of the United States, and the question was decided against the privilege claimed under the Constitution by the defendants.
>
> "We cannot, therefore, dismiss the case for

want of jurisdiction, although we may have a very clear conviction that the decision of the state court was correct."

The jurisdiction of the court cannot be doubted in regard to the immunity set up by the appellant from regulations of commerce by the Secretary of Agriculture. The Constitution provides that the Congress shall have power to regulate commerce between the states. From this provision the court has drawn the necessary implication that at least in matters in which a national and uniform rule is possible the states have no power to regulate interstate commerce. *Robbins* v. *Shelby County Taxing District,* 120 U. S., 489, 492 (1887). By like reasoning they must with still greater force draw the conclusion that no officer of the Federal Government has power to regulate interstate commerce in such matters, but only the Congress of the United States. That the matter of cattle quarantine is one in which a national and uniform rule is possible is shown by the fact that the Secretary of Agriculture has always in his regulations undertaken to provide a quarantine for the whole country, and that the quarantine line is one crossing the entire area of the United States. The appellant claimed below the right to be free from liability predicated on any Federal regulations of interstate commerce not made by Congress, and this right or immunity was denied.

No particular form of words is needed to raise the Federal question.

Dewey v. *Des Moines,* 173 U. S., 193, 199 (1899).

Green Bay, etc., Canal Co. v. *Patten Paper Co.,* 172 U. S., 58, 67 (1898).

The record shows that "the question was necessarily involved in the decision."

Great Western Tel. Co. v. *Purdy,* 162 U. S., 329, 334-5 (1896).

In such case the certificate of the presiding judge will be looked to to ascertain whether the question was in fact raised.

Armstrong v. *The Treasurer,* 16 Peters, 281, 285 (1842).

Lawler v. *Walker,* 14 How., 149, 153 (1852).

Medberry v. *The State,* 24 How., 413, 414 (1860), also cases cited below.

The certificate of the Presiding Judge is not merely waste paper. It cannot of itself invest this court with jurisdiction, it is true; but if the record discloses the fact that a Federal question was necessarily involved, and that the judgment could not have been rendered without deciding that question, then the certificate is admissible to show that it was raised, and the attention of the court called to it before judgment, and that the court did in fact pass on it.

"While such certificate is insufficient to give us jurisdiction, where such a jurisdiction does not appear in the record, it may be resorted to, in the absence of an opinion, to show that a federal question which was otherwise raised in the record, was actually passed upon by the court."

Gulf & Ship Island R. R. Co. v. *Hewes,* 183 U. S., 66, 68 (1901).

Armstrong v. *Athens, County Treasurer,* 16 Pet., 281, 285 (1842).

Parmelee v. *Lawrence,* 11 Wall., 36, 39 (1870).

Brown v. *Atwell,* 92 U. S., 327, 330 (1875).

Gross v. *U. S. Mortgage Co.*, 108 U. S., 477, 486 (1883).

Roby v. *Colehour*, 146 U. S., 153, 160 (1892).

Dibble v. *Bellingham Bay Land Co.*, 163 U. S., 63, 70 (1896).

Yazoo & Miss. V. R. R. Co. v. *Adams*, 180 U. S., 41, 48 (1901).

In the case of *Oxley Stave Company* v. *Butler County*, 166 U. S., 648, 657, 660 (1897), Mr. Justice Harlan, in delivering the opinion of the Court, at page 657, says:

> "It is not always necessary to refer to the precise words or to the particular section of the Constitution, under which some right, title, privilege or immunity is claimed, * * * it is sufficient if it appears affirmatively from the record that a right, title, privilege or immunity is specially set up or claimed under that instrument or under the authority of the United States."

At page 660, he says:

> "If it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained."

The record in the present case leaves no doubt upon the subject that the State Court considered the Federal rights and immunities claimed by the plaintiff in error, as having been raised, and denied the claim so asserted.

In the case of *Beer Company* v. *Massachusetts*, 97 U. S., 25, 30 (1877), Mr. Justice Bradley said, in delivering the opinion of the court:

> "It is apparent from the record that the very point now sought to be argued was made on the

trial of the cause in the Superior Court, and was passed upon, and made decisive of the controversy, and was afterwards carried by bill of exceptions to the Supreme Judicial Court, and was decided there adverse to the plaintiff in error on the very ground on which it seeks a reversal. * * * This is sufficient for our jurisdiction, and we are bound to consider the question which is thus raised."

In *Nutt* v. *Knut*, ... U. S., ... (Jan. 2, 1906), a suit against an estate for attorney's fees in collecting a claim against the United States, the defendant set up that by Section 3477 of the Revised Statutes, all assignments of unallowed claims against the United States were null and void. It was claimed that the court had no jurisdiction. The court said:

"A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of Section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved. *Logan County Nat. Bank* v. *Townsend*, 139 U. S., 67; *Dubuque and S. C. R. Co.* v. *Richmond*, 15 Wall., 3; *Swope* v. *Leffingwell*, 105 U. S., 3; *Anderson* v. *Carkins*, 135 U. S., 483, 486; *McNulta* v. *Lochridge*, 141 U. S., 327; *Metropolitan Nat. Bank* v. *Claggett*, 141 U. S., 520; *McCormick* v. *Market Nat. Bank*, 165 U. S., 538, 546; *California Nat. Bank* v. *Kennedy*, 167 U. S., 362."

"We perceive no sufficient reason to modify the views expressed in those cases as to our jurisdiction. It is true there are some cases which, it is contended, justify a contrary view. We will not

> now stop to examine those cases narrowly, and to declare wherein they may be in conflict with the cases above cited. Suffice it to say that, upon a careful reconsideration of the whole subject, and after reviewing all the cases bearing upon the precise question of jurisdiction now before us, we reaffirm the views expressed in the above-cited cases, as demanded by the statutes regulating the jurisdiction of this court."

In regard to the matter whether or not the Federal questions were sufficiently raised in the court below, the very authorities cited by the Attorney General upon the 14th page of his "Suggestion of the Want of Jurisdiction and Brief Thereon" show that the Federal questions were sufficiently presented. In the case of *Sayward* v. *Denny,* 158 U. S., 180, cited by him, at page 184, the court say:

> "Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such Federal question by its decision. *Powell* v. *Brunswick County,* 150 U. S., 400, 433."

The case at bar falls within this rule.

Also, in *Marvin* v. *Trout,* 199 U. S., 212, cited by him, the court say at page 223:

> "It is well settled, in this court, that a certificate from a presiding judge of the state court, made after the decision of the case in that court, to the effect that a Federal question was considered by the court adversely to the plaintiff in error, cannot confer jurisdiction on this court, *where the record does not otherwise show it to exist;* that

> the effect of such a certificate is to make more certain and specific what is too general and indefinite in the record itself, but it is incompetent to originate the Federal question. *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S., 63; *Henkel* v. *Cincinnati*, 177 U. S., 170; *Fullerton* v. *Texas*, 196 U. S., 192."

We have italicized a portion of this quotation. In the present case the record does show that the Federal questions were raised and the certificate of the trial judge shows that he ruled upon them unfavorably to the plaintiff in error.

In the case at bar the plaintiff in error set up by answer its immunities under the statute and under the Constitution.

The attention of the court is particularly directed to the way the Federal question was presented in the case of *Green Bay, etc., Co.* v. *Patten Paper Co.*, 172 U. S., 58 (1898). The second paragraph of the opinion of the court delivered by Mr. Justice Shiras, is as follows:

> "The contention that no Federal question is disclosed in the record is sufficiently disposed of, we think, by an inspection of the cross-complaint filed by the Green Bay and Mississippi Canal Company. It was therein claimed that the water power in question was created by a dam, canal and other improvements owned and operated by the United States, and that the right and title of the said Canal Company to the use of the water power so created arose under and by virtue of certain alleged and recited acts of Congress and acts of the legislature of the State of Wisconsin, relating to the improvement of Fox River as a public highway, and especially by virtue of an alleged contract between the United States and the Canal

Company, whereby the use of the surplus water created by said dam and canal was granted and reserved to the Canal Company."

Also, upon page 68, the Court speaks as follows:

"As then in its cross-complaint, the Canal Company explicitly set up and claimed, as the foundation of its alleged rights, the acts of Congress and the transactions between the United States and the Canal Company, under which the United States became the owner of the dam, canal and other improvements on the Fox River, and the Canal Company became vested with its rights in the surplus water power incidental to said works, and as, in the final judgment, the Supreme Court of Wisconsin necessarily held adversely to these claims of Federal right, we hold that the motion to dismiss for want of jurisdiction must be overruled, and that it is our duty to inspect the record in order to see whether there was error in the rulings of the court below."

The plaintiff in error ought not to be held liable in damages for transporting cattle in interstate commerce, where the judgment rests alone upon an alleged violation of a regulation made by the Secretary of Agriculture and without any proof of negligence, the effect being that in satisfaction of such judgment, the property of plaintiff in error would be taken virtually as a penalty for such alleged violation, and therefore, as a direct result of such regulation alone, and notwithstanding the claim that the taking of property under such circumstances would be unconstitutional.

If there can be no relief by writ of error from this court to a court of last resort in a state, which mulcts a railroad company in damages, alleged to have accrued by communication of contagious diseases from cattle transported in interstate commerce, the judg-

ment being predicated, not upon any proof of knowledge upon the part of the representatives of the railroad company that the cattle transported were so infected, or any negligence whatsoever in respect of such transportation upon the part of the railroad company, but alone upon the two propositions, first, that the disease was actually communicated from such cattle, and secondly, that they were transported in violation of a regulation of the Secretary of Agriculture, acting under a statute of the United States, then a case is presented of final liability, founded alone upon a United States statute, and its enforcement, by a state court, without any check upon such enforcement by the sovereign which makes such statute. The result would be that railroad companies could be made liable everywhere in state courts in respect of such interstate transportation, and that it would be carried on, although such transportation is subject to regulation alone by the federal authorities, at the peril of responsibility alone to state authorities.

For the foregoing reasons it is respectfully submitted that the writ of error is within the jurisdiction of the court and should not be dismissed.

J. M. Dickinson.
Edmund F. Trabue.
Blewett Lee.